Supreme Court, U.S.
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(3)

In The
Supreme Court of the United States

JESSIE TOMPKINS; AUDRA BEASLEY; JAMES W. SCOTT; RODNEY SMITH,
Petitioners,

v.

ALABAMA STATE UNIVERSITY; ALABAMA STATE UNIVERSITY BOARD OF TRUSTEES; STATE OF ALABAMA; DR. WILLIAM HARRIS; DR. ROOSEVELT STEPTOE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF ALABAMA STATE UNIVERSITY RESPONDENTS IN OPPOSITION TO CERTIORARI

Armand Derfner
Counsel of Record
Post Office Box 600
Charleston, SC 29402
(843) 723-2460

Kenneth Thomas
THOMAS, MEANS & GILLIS
Post Office Box 5058
Montgomery, AL 36103
(334) 270-1033

Solomon S. Seay, Jr.
ATTORNEY AT LAW
Post Office Box 210998
Montgomery, AL 36121
(334) 274-0722

Attorneys for Respondents Alabama State University, Alabama State University Board of Trustees, Harris, and Steptoe ("Alabama State University Respondents")

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

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QUESTIONS PRESENTED

1. Where the petitioners filed a complaint seeking to challenge certain scholarships created by court order in a statewide desegregation case in which a certified class which included the petitioners had been a party, did the lower courts err in following the longstanding practice of dismissing this new complaint without ruling on the merits of any claims or defenses but with leave to petitioners to seek intervention in the desegregation case so that the challenge to the scholarships could be considered in the case where they had been ordered?

2. Where the above-described procedural order was entered without ruling on any claims or defenses, have the petitioners suffered any injury?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 1

The *Knight* case 1

The proceedings below 4

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR THIS COURT 6

A. Consolidating desegregation proceedings in a single case is a standard practice in the courts of appeals 6

B. This Court's cases are not to the contrary 8

II. THE INTERVENTION RULE IS SUPPORTED BY SOUND PRINCIPLES OF DOCKET MANAGEMENT 9

A. Avoiding duplication and waste of effort .. 10

B. Avoiding conflicting judgments.....10

C. Protecting the interests of the *Knight* class.....11

CONCLUSION.....14

TABLE OF AUTHORITIES

CASES

Bradley v. Pinellas County Sch. Bd.,
961 F.2d 1554 (11th Cir. 1992) 7

Davis v. Board of Sch. Comm.,
517 F.2d 1044 (5th Cir. 1975) 7

Dayton Bd of Educ. v. Brinkman,
433 U.S. 406, 421 (1977) 11

Garcia v. Board of Education,
573 F.2d 676 (10th Cir. 1977) 7

Grayson v. K-Mart Corp.,
79 F.3d 1086 (11th Cir. 1996) 1

Hansberry v. Lee,
311 U.S. 32 (1940) 8

Hines v. Rapides Parish Sch. Bd,
479 F.2d 762 (5th Cir. 1973) 6, 8, 10

Knight v. Alabama,
787 F.Supp. 1030 (N.D.Ala. 1991),
14 F.3d 1534 (11th Cir. 1994),
900 F.Supp. 272 (N.D.Ala. 1995) ..... passim

Louisiana v. United States,
380 U.S. 145, 154 (1965) 11

Martin v. Wilks,
490 U.S. 755 (1989) 8, 9, 10

Miller v. Board of Educ.,
667 F.2d 946 (10th Cir. 1982) 7

Milliken v. Bradley,
418 U.S. 717 (1974) 11

Nixon v. Fitzgerald,
457 U.S. 731, 741-43 (1982) 1

Ortiz v. Fiberboard Corp.,
No. 97-1704 (June 23, 1999) 9

Rivarde v. Missouri,
930 F.2d 641 (8th Cir. 1991) 7

Spangler v. Pasadena City Bd. Of Educ.
552 F.2d 1326 (9th Cir. 1977) 7

United States v. Fordice,
505 U.S. 717 (1992) 11

STATUTES

28 U.S.C. § 1254 1

BRIEF OF ALABAMA STATE UNIVERSITY RESPONDENTS IN OPPOSITION TO CERTIORARI

This Brief in Opposition to Certiorari is filed on behalf of four of the five respondents: Alabama State University, Alabama State University Board of Trustees, Dr. William Harris (who is President of Alabama State University), and Dr. Roosevelt Steptoe (who is Vice President for Academic Affairs of Alabama State University). The remaining respondent, the State of Alabama, is filing a separate brief.

JURISDICTION

This Court's jurisdiction is in doubt because the jurisdiction of the court of appeals was in doubt. Because the district court's order was in the nature of a docket management order which adjudicated no substantive or procedural rights, its order appears not to have been a final, appealable order. *See Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996). If the court of appeals lacked jurisdiction, the case was not properly "in" the court of appeals, which is a prerequisite for this Court's jurisdiction under 28 U.S.C. § 1254. *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982).

STATEMENT OF THE CASE

Because the petitioners seek to relitigate portions of decrees in another case, *Knight v. Alabama*, it is appropriate to begin the Statement with a brief summary of *Knight*.

The *Knight* case

Knight v. Alabama was filed by the United States and by a class of plaintiffs including all black residents of

Alabama in the early 1980's, alleging a long history of massive racial discrimination and segregation in the public higher education system of Alabama, which had injured and continue to injure black students and prospective students. Significant aspects of this discrimination included the limited mission of Alabama State University (a historically black university), its limited degree of desegregation, and the negative perceptions of the school among many white people -- all of which contributed to further injuring black students who attend or might wish to attend Alabama State University.

After a six-month trial, the district court found massive violations, and ordered a comprehensive remedy. Among other things, the remedy mandated further desegregation of Alabama State University and included measures to assist in doing so. *Knight v. Alabama*, 787 F.Supp. 1030 (N.D.Ala.1991). The *Knight* plaintiffs, representing the class of black Alabamians, appealed seeking additional relief, and the court of appeals ordered the district court to consider specific relief for the limited missions of the historically black schools. 14 F.3d 1534 (11th Cir. 1994).

On remand, the district court conducted a three-month trial in which the parties addressed the limited mission issue as well as progress under the 1991 decree. The court found that Alabama State University's mission, which had been discriminatorily limited by the State, contributed to the school's difficulty in desegregating its student body. It also found that the 1991 order had achieved only limited success in attracting other-race students to this historically African-American school. 900 F.Supp. 272 (N.D.Ala. 1995).

Based on the meager results of the 1991 remedy, and evidence concerning the effectiveness of various remedies, the district court decreed a comprehensive set of inter-related remedies, including new academic programs at Alabama State University, new state-supported endowment funds, and

new state-funded desegregation or diversity scholarships to help attract non-African-American students to Alabama State University. The new scholarships were to be separately funded by the State and were thus in addition to, not in place of, existing scholarship funds already available to all students.

The desegregation scholarships, according to the *Knight* court, were specifically designed to attract other-race students to Alabama State University and to overcome negative perceptions held by many white people about the school. The court found that attracting a "critical mass" of other-race students would have these effects, 900 F.Supp. at 320, and, along with the institution of new, high demand academic programs and enhanced facilities, would likely achieve the goal and ultimately make the racial scholarships unnecessary. Without the desegregation scholarships, however, the *Knight cour*t found, the remedial goals would likely be unattainable, and the success of the new programs and other remedial measures would be undermined. *Id.*[1]

The *Knight* court retained jurisdiction over the remedy including the diversity scholarships, and that jurisdiction continues actively today.

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[1] Before ordering creation of the scholarships, the *Knight* court received briefs from the parties concerning their constitutionality. The order creating the scholarships specified the violations which it had found and which could not be redressed by more modest measures, some of which had been tried and failed. 900 F.Supp. at 318-20. The order contained narrow tailoring provisions which, among other things, limited the scholarships to Alabama residents, limited each student's length of eligibility, and provided for periodic reporting and review to determine whether or when to modify or terminate the scholarships. 900 F.Supp. at 356-58.

The proceedings below

Petitioners are four black Alabama citizens who are or were students at Alabama State University. They filed a complaint alleging racial discrimination in their failure to receive or be considered for the diversity scholarships offered by Alabama State University.

Petitioners' challenge to the diversity scholarships was a direct attack on the *Knight* decree. Nevertheless, the initial complaint and two successive amended complaints did not identify the diversity scholarships as the product of Orders in the *Knight* case, and did not identify petitioners as members of the plaintiff class of all black citizens of Alabama which had been certified in *Knight*. Petitioners' complaint also did not refer to representation -- adequate or inadequate -- by their class representatives in *Knight*. Pet., p. G1.[2]

On respondents' motion, the district court dismissed the petitioners' complaint without prejudice to seeking to intervene in the *Knight* case. Pet., p. B1. The district court said it was not ruling on the merits of any claims or defenses, and that "all these issues remain to be litigated and resolved if and when the *Tompkins* plaintiffs move to intervene in the *Knight* litigation." Pet., p. B16.

The district court emphasized that its procedural dismissal would fully protect all the petitioners' due process rights. Their right to be heard would depend primarily on whether they were inadequately represented in *Knight* by the class representatives. This would be true whether in an intervention or in a collateral attack, so requiring petitioners to proceed by a motion to intervene would not change their burdens or the applicable legal rules. Pet., pp. B14-B15.

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[2] Petitioners filed their original complaint in the Middle District of Alabama, rather than the Northern District where the *Knight* case was pending. The Middle District transferred the case to the Northern District. C.A. No. 97-T-471-N (M.D.Ala. June 16, 1997).

The district court noted that the intervention procedure was a familiar one which had been followed in school desegregation cases by several circuit courts of appeal, and that this procedure allowed a challenge to a desegregation order to be considered as a whole rather than piecemeal, promoted judicial efficiency, and minimized conflicting judgments. Pet., pp. B8-B12.

Petitioners appealed, and the court of appeals affirmed per curiam. Pet., p. A1.

This petition followed.

SUMMARY OF ARGUMENT

The decision below does not conflict with any other circuit, and does not conflict with any decision of this Court.

There is no dispute that the Tompkins plaintiffs are members of the class that was certified in *Knight v. Alabama*, and that the *Tompkins* complaint is a collateral attack on the court order in *Knight*. The order below does not bar this collateral attack. Whether such an attack can be maintained has yet to be determined, and the question here is only what case it will be determined in.

Following longstanding precedent in several circuits, the district court held that such an attack should be presented by a motion to intervene in the ongoing *Knight* case. The district court's procedural dismissal of the *Tompkins* complaint did not affect the Tompkins plaintiffs' rights, because their right to proceed in an independent case -- which requires them to prove they were inadequately represented in *Knight* -- is no greater than their right to intervene in *Knight*.

While the Tompkins plaintiffs will not be injured by having to seek intervention in the *Knight* case, the *Knight* parties, including the class of black citizens of Alabama, will be injured if the Tompkins plaintiffs are allowed to try their claim in isolation as they wish to do, without regard to the *Knight* record that led to that court's creation of the

scholarships. Because the scholarships are part of an overall remedy to end discrimination and segregation, considering a challenge in isolation could unravel the remedy while ignoring its purpose.

Requiring a challenge like this to be made in the original desegregation case therefore insures that a court will not decide the case in a vacuum, and guards against conflicting judgments. The district court's order, affirmed by the court of appeals, reached that result without depriving the Tompkins plaintiffs of any substantive or procedural rights.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR THIS COURT

A. Consolidating desegregation proceedings in a single case is standard practice in the courts of appeals.

In ordering a procedural dismissal, the district court reviewed and followed a standard practice that has been in use in school desegregation cases for a quarter century and has been approved by at least five courts of appeals. Respondents are not aware of any court that has rejected the procedure.

The procedure was first adopted by the Fifth Circuit in *Hines v. Rapides Parish Sch. Bd*, 479 F.2d 762 (5th Cir. 1973). There, a court adopted a comprehensive, district-wide school desegregation plan and retained jurisdiction to protect its judgment and insure successful operation of the plan. Later other citizens who were dissatisfied with the desegregation plan's operation filed a new suit. The district court dismissed the new complaint, but on appeal the Fifth Circuit held there must be a way for citizens "to present their complaints about the school system which results from a

desegregation order without fostering a multiplicity of new lawsuits over the same complicated and emotional issues which have already once been fought out in an all too lengthy court battle." The solution was to allow the new litigants to seek to intervene in the prior action, which was still being actively supervised by the district court. 479 F.2d at 765.

Later cases uniformly followed and elaborated on this approach, not only in the Fifth and Eleventh Circuits, but in other circuits as well. *Davis v. Board of Sch. Comm.*, 517 F.2d 1044 (5th Cir. 1975); *Bradley v. Pinellas County Sch. Bd*, 961 F.2d 1554 (11th Cir. 1992); *Rivarde v. Missouri*, 930 F.2d 641 (8th Cir. 1991); *Spangler v. Pasadena City Bd of Educ.*, 552 F.2d 1326 (9th Cir. 1977); *Miller v. Board of Educ.*, 667 F.2d 946 (10th Cir. 1982).[3] The courts of appeals observed that by preventing duplication, the intervention rule not only saved needless effort but also avoided the risk of inconsistent judgments.

These cases have all made clear that the intervention procedure does not take away any substantive or procedural rights, *e.g., Davis*, 517 F.2d at 1049, such as the right to discovery and an evidentiary hearing before a ruling on the intervention petition. *Bradley, supra.* The district court in this case also pointed out that the plaintiffs would not lose any due process rights by having to seek to intervene in the *Knight* case, because the showing required to mount a collateral attack -- chiefly inadequate representation -- is the same in a collateral lawsuit as in a motion to intervene. Pet., pp. B14-B15.

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[3] *Garcia v. Board of Education*, 573 F.2d 676 (10th Cir. 1977), cited by petitioners, is not in conflict. That case found the would-be challengers had been adequately represented, and the court therefore had no occasion to consider what forum would have been proper if the challenge had been allowed. The later *Miller* case, cited in the text, states the law in the Tenth Circuit, approving the intervention rule.

The intervention procedure is particularly well-suited to school desegregation cases, which have always presented special problems of enforcement. For example, this Court's "all deliberate speed" rule, adopted in 1955, contemplated a period of judicial supervision before a school system would be unitary. And the courts have recognized the systemic nature of the wrongs and the necessary remedies, so that a school desegregation plan must be viewed as a whole in addition to being a resolution of individual violations.

The district court carefully studied the history of school desegregation litigation, and correctly applied it here after finding that doing so would not deprive plaintiffs of any rights.

B. This Court's cases are not to the contrary.

Petitioners assert that the procedural rule of *Hines v. Rapides Parish* violates *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Martin v. Wilks*. 490 U.S. 755 (1989). But *Hansberry*, which guarantees a forum to a class member who can show inadequate representation, does not guarantee the right to choose which forum. The *Hines v. Rapides Parish* line of cases is consistent with *Hansberry* because they both allow a litigant to proceed at least upon proof of inadequate representation. *Hansberry* does not support a general right of collateral attack.

Likewise, the judgment below is consistent with *Martin v. Wilks, supra*. In that case this Court rejected a doctrine called "impermissible collateral attack" insofar as some courts had required a *non-party* to intervene on pain of being bound by the judgment. The petitioners apparently believe that *Martin v. Wilks* now allows anyone to bring a collateral attack on anything, and bars any order requiring anyone to intervene.

But *Martin v. Wilks* does not change anything here because that case was about non-parties, and it specifically reaffirmed the binding effect of judgments on class

members. 490 U.S. at 762n.2. Here we are dealing with class members, who of course are still bound unless they were inadequately represented. And the issue of inadequate representation brings us back again to the intervention because the showing of inadequate representation is a prerequisite to the plaintiffs proceeding, no matter where they are. See *Ortiz v. Fiberboard Corp.*, No. 97-1704 (June 23, 1999).[4]

II. THE INTERVENTION RULE IS SUPPORTED BY SOUND PRINCIPLES DOCKET MANAGEMENT

Petitioners' plainly wish to try their case in a vacuum. This is best captured in a revealing passage at page 19 of the Petition for Certiorari, where they complain that the order below requires them to "wade into the morass" of the desegregation suit. With all due respect, the "morass" that petitioners so disparagingly dismiss is a two-decades-long battle to gain for black students an equal opportunity for higher education in Alabama. Petitioners may not value this effort or this goal, but they are not entitled to have the courts ignore the interests of the students in whose behalf the *Knight* case has been and is still being fought.

Requiring the Tompkins plaintiffs' concerns to be raised in the *Knight* case rather than a separate case is not a mere formality. The courts have identified several distinct purposes served by the intervention rule: avoiding duplication and waste of effort, avoiding inconsistent judgments, and protecting the interests of beneficiaries of the original judgment.

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[4] Moreover, in *Martin*, intervention was arguably no longer an option because challengers to the underlying decree had sought intervention in the original case and been denied. Accordingly, while *Martin* addresses the right to a day in court, the Court had no occasion there to address the "which court" question.

A. Avoiding duplication and waste of effort

Whether the *Tompkins* petitioners must seek intervention in *Knight,* or whether they are allowed to proceed in a new case, there are no short-cuts. In either event, they must squarely address the *Knight* case, including the record, findings, and relief. Thus, petitioners do not lose anything by having to proceed in *Knight*. The courts and the *Knight* parties, on the other hand, lose a great deal if they must litigate the validity of these scholarships anew. The parties and the court in *Knight* shouldered a heavy burden in developing a record and in fashioning relief scrupulously tied to that record. There is no magic slogan that allows the *Tompkins* petitioners to undo that relief without a corresponding effort.

B. Avoiding conflicting judgments.

The specter of conflicting judgments which has concerned lower courts is no small matter. If the petitioners are allowed to proceed in this case (to which the *Knight* class is not a party), and obtain judgment entitling them to apply for or receive diversity scholarships, that will plainly conflict with the judgment in *Knight*. What result then? Could the *Knight* plaintiffs or anyone else can simply return to the *Knight* court and obtain a new judgment, or file a new lawsuit that in turn supersedes or "trumps" the *Tompkins* judgment? This is not a question answered in *Martin v. Wilks*.

If for no other reason, avoidance of tit-for-tat litigation would be grounds enough to sustain the *Hines* procedure of keeping all challenges to desegregation plans in a single case

C. Protecting the interests of the *Knight* class.

Even more than simply avoiding the burden of relitigation, other parties in *Knight* have a critical interest in the relief obtained there. Both the United States and the *Knight* class (which includes the Tompkins petitioners) have fought for many years to gain effective relief to end segregation and racial discrimination. The relief of which the petitioners complain was designed to benefit all students in the *Knight* plaintiff class by promoting desegregation at the historically black schools and thus enhancing the educational opportunities of the students, mostly black students, who might choose to attend the historically black schools. If Tompkins attacks the relief, he attacks a building block in the structure of improving educational opportunities at the historically black schools.

The interest of the *Knight* class in full and effective relief would be undermined by litigating in a vacuum. For example, considering the diversity scholarships in isolation from the record that produced them would ignore the basic rule that the scope of any remedy is determined by the nature and extent of the violation. *E.g., Milliken v. Bradley*, 418 U.S. 717 (1974); *Dayton Bd of Educ. v. Brinkman*, 433 U.S. 406, 421 (1977). When the *Knight* court devised its remedies, it was mindful of this Court's mandate that a court has "not merely the power but the duty to enter a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). That rule, applied to higher education by *United States v. Fordice*, 505 U.S. 717 (1992), requires a judicial remedy to be evaluated by a careful examination of the record underlying the remedy -- which petitioners seek to avoid.

As another example, the specific relief which petitioners apparently seek -- making the diversity scholarships available to all students without regard to race --

would likely have the effect of eliminating the scholarships entirely, thus having a double effect of undermining the desegregation remedy *and* depriving black and white students at Alabama State University of scholarship funds. This is because the scholarships were created for the express purpose of desegregation, and a change in their nature would directly frustrate the desegregation goal, as the *Knight* court has found:

> These funds are to be used to achieve the diversification of the student bodies on the AAMU and ASU campuses. . . . The Court will not approve any scholarship criterion that does not maintain complete and total fidelity to the desegregation objective. These funds are not to be used to attract black students to the University. [Order of September 25, 1995, 900 F.Supp. at 382.][5]

In short, if the *Knight* remedy is to be threatened, the beneficiaries of that remedy are entitled to know that it will be done not by indirection, but instead with full awareness of all the antecedents and consequences.

Respondents do not say that the above considerations mean the Tompkins plaintiffs will be denied intervention in

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[5] Accordingly, a successful challenge to the desegregation scholarships would almost certainly *decrease* the amount of scholarship funds available to black students at Alabama State University. This is because a ruling against the constitutionality of the desegregation scholarships would leave Alabama State University with its original, unaugmented, amount of scholarship funds, to spread among both its black and its white students. Moreover, because of the University's efforts to attract more white students, and the requirement that those efforts intensify, the number of white students competing with black students for those original funds would have increased, thus cutting black students' scholarship funds more and more each year.

Knight,[6] or that they will lose on the merits if they are allowed to intervene. Those questions are not before this Court at this time.

What these considerations do mean is that there are no short-cuts. Alabama State University, other litigants and other citizens throughout the State of Alabama, including the *Knight* class and the United States, have worked too hard at the process of desegregation to have important building blocks in the remedy dismantled by one-dimensional litigation which ignores all that has gone before.

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[6] Petitioners complain that nearly a year has gone by since they did in fact petition to intervene in *Knight*. But that time has been spent on discovery and briefing, mainly the question of adequacy of representation, just as the time would have to be spent on these matters before a separate suit like this one could be allowed to proceed to the merits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Armand Derfner *
P.O. Box 600
Charleston, SC 29402
(843) 723-2460
* Counsel of Record

Kenneth Thomas
Thomas, Means & Gillis, P.C.
3121 Zelda Court
P.O. Box 5058
Montgomery AL 36103-5058
(334) 270-1033

Solomon S. Seay, Jr.
P.O. Box 201998
Montgomery, AL 36121
(334) 274-0722

Attorneys for Respondents Alabama State University, Alabama State University Board of Trustees, Harris, and Steptoe ("Alabama State University Respondents")